No. 80-581

Supreme Court, U. S.
FILED
NOV 20 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COMMONWEALTH EDISON COMPANY, CENTRAL ILLINOIS LIGHT COMPANY, DAIRYLAND POWER COOPERATIVE, DETROIT EDISON COMPANY, INTERSTATE POWER COMPANY, LAKE SUPERIOR DISTRICT POWER COMPANY, LOWER COLORADO RIVER AUTHORITY/CITY OF AUSTIN, MINNESOTA POWER & LIGHT COMPANY, NORTHERN STATES POWER COMPANY, UPPER PENINSULA GENERATING COMPANY, WISCONSIN POWER & LIGHT COMPANY, DECKER COAL COMPANY, PEABODY COAL COMPANY, WESTMORELAND RESOURCES, INC. and WESTERN ENERGY COMPANY,
Appellants,

—against—

STATE OF MONTANA, THOMAS L. JUDGE, GOVERNOR OF MONTANA, MARY CRAIG, DIRECTOR OF THE STATE DEPARTMENT OF REVENUE, and DAVID M. LEWIS, DIRECTOR OF ADMINISTRATION AND STATE TREASURER,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

APPELLANTS' OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

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, November, 1980

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—against—

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Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

Appellants submit this brief in opposition to appellees' Motion to Dismiss or Affirm.

ARGUMENT

I.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This case clearly raises substantial federal questions which have not been addressed squarely by this Court in modern times under modern Commerce Clause tests. Appellees concede that the "power of states to tax is, of course, not unlimited." (Motion to Dismiss or Affirm at 5) ("Motion"). They nowhere discuss how those limits are to be imposed. Their actual position here—that no such limits can be found in the Constitution—raises questions

which are timely, fundamental, and lie at the heart of the federal system. Appellees would strip these questions of their "contemporary emotionalism" in order to diminish their importance (Motion at 1-2), but that cannot be done readily or safely, for the questions arise in a context of vital national importance and require answers which necessarily have far reaching economic and practical impacts as this Nation attempts to take those sometimes painful steps necessary to resolve the energy crisis.

II.

SEVEN STATES HAVE ALREADY URGED REVERSAL

The answer given to these questions by the courts of appellees' home state—that its power to tax this resource has no constitutional limits—is deeply divisive. No less than seven states—Iowa, Kansas, Michigan, Minnesota, New Jersey, Texas and Wisconsin—have already filed *amicus* briefs urging reversal. Appellants' counsel have been advised that several other states intend to appear as *amici* urging reversal, if this Court notes probable jurisdiction.

III.

THE CASE IS APPROPRIATE FOR JUDICIAL ACTION

Appellees argue that the questions presented here should be left to Congress. But in testimony before the United States Senate just a few months ago, Governor Judge of Montana took the contrary view, saying:

> The reasonableness of the [Montana Coal Severance] tax will be decided probably in the Supreme Court.

* * * * *

> There you will decide on the reasonableness or the burden on interstate commerce and *that is a question most properly left to the court* and not determined by a committee of the United States Senate.[1]

In any event, this Court has made it clear that courts have the duty, in appropriate circumstances, to determine whether state taxes meet constitutional standards and, among other things, whether they are "fairly related to benefits provided the taxpayer." *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 287 (1977). This does not require the courts to set an appropriate rate of tax but it does require the courts to use constitutional yardsticks, established by this Court, to determine whether a rate adopted by a legislature meets such standards. That is precisely the sort of decision courts are frequently called upon to make. *See, e.g., Evansville Airport* v. *Delta Airlines, Inc.*, 405 U.S. 707, 716-20 (1972); *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583, 598-600 (1939); *Dixie Ohio Co.* v. *Revenue Comm'n*, 306 U.S. 72, 77-78 (1939); *Ingels* v. *Morf*, 300 U.S. 290, 296-97 (1937). *See also Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542, 548 (1950).

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1 Testimony of Hon. Thomas Judge, Governor of Montana, before the United States Senate, Committee on Energy and Natural Resources, *Transcript of Proceedings — S. 2695, To Amend the Powerplant and Industrial Fuel Use Act of 1978 to Further the Objectives of National Energy Policy of Conserving Oil and Natural Gas Through Removing Excessive Burdens on Production of Coal* at 143 (August 6, 1980) ("Hearings"). (Emphasis supplied).

Governor Herschler of Wyoming similarly testified as follows:

> If we are concerned about the consumer, then I think *whether or not a severance tax is a burden on interstate commerce should be determined by the United States Supreme Court and not by legislation in Congress.* We're willing to take that risk, Mr. Chairman, with our court system.

Hearings at 125-26. (Emphasis supplied).

IV.

APPELLEES HAVE SIMPLY SIDE-STEPPED APPELLANTS' CENTRAL ARGUMENT

Appellees altogether fail to meet the argument that there have been manifest, unmistakable changes in Commerce Clause doctrines since 1937. Cases such as *Labor Board* v. *Jones & Laughlin*, 301 U.S. 1 (1937), and *Wickard* v. *Filburn*, 317 U.S. 111 (1942), represent a repudiation of the outmoded doctrines of *Heisler* and *Carter Coal*, that an activity has to be "in" interstate commerce before it may be reached by the Commerce Clause. Now, if as here an activity substantially affects commerce it is within the reach of the Commerce Clause.

V.

THE "FAIRLY RELATED" TEST RAISES ISSUES OF FACT

Appellees are driven to argue that Montana's Coal Severance Tax is "fairly related to benefits provided [to appellants] by the State" because Montana provides fire and police protection, an orderly system of laws and other benefits universally afforded by each of the fifty states. (Motion at 14). But if this meets the "fairly related" test repeatedly announced by this Court in recent years in Commerce Clause cases involving state taxes, the test has no real meaning, because it can be met by any state and under any circumstance.

If the "fair relation" test has any meaning at all, it requires a factual determination to be made in appropriate cases. If the test is ever to find application, this is the case. The Montana tax was enacted by a legislature which made no effort to balance costs and benefits; it has

resulted in a tax manifestly unrelated to any services provided. Fifty percent (50%) of the tax revenues are presently cached away in a trust fund for future generations.

As we have previously noted (Jurisdictional Statement at 20), cases in this Court clearly suggest that the test is factual and depends on the record. *See, e.g., Washington Rev. Dep't* v. *Stevedoring Ass'n*, 435 U.S. 734, 750-51 (1978).[2] *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434 (1979), is not to the contrary. In the first place, the language on which appellees particularly rely (Motion at 15) appears to be merely a restatement of one of the arguments advanced by appellees, not a holding of the Court. Moreover, to the extent that the Court indicated that the argument was "not without force," it did so simply as an assumption for purposes of argument, in a case in which the tax was invalidated on other grounds, and on the basis of a factual record which apparently did not disclose a gross disparity between the revenues derived from the tax and the cost of services provided to the taxpayer.

Since this is an appeal and not a petition for *certiorari*, the granting of the Motion to Dismiss or Affirm would constitute a holding of this Court with respect to this issue, as well as others presented on this appeal. We

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2 In his concurring opinion in *Washington Rev. Dep't* v. *Stevedoring Ass'n*, 435 U.S. 734, 764 (1978), Justice Powell remarked that the Court's statement concerning the record in the case "cannot be questioned." It strains credulity to argue, as appellees do (Motion at 15-16), that this means that he would bar proof on this issue in all future cases. *Compare City of Pittsburgh* v. *Alco Parking Corp.*, 417 U.S. 369, 379 (1974) (Powell, J. concurring) where it is plainly advanced, in a similar context, that the Court's decision should *not* be read as barring proof in future cases.

submit that such a constitutional ruling of far reaching significance—one which would substantially eliminate one of the four prongs of the *Complete Auto* test—should not be made without the benefit of a full factual record and without full consideration after briefs and argument here.

Appellees correctly note that the foregoing claims are closely tied to appellants' observation that the Severance Tax was "tailored" to fall on out-of-state residents. Four coal-producing taxpayers now before this Court pay substantially all of this tax; prior to adoption of the thirty percent (30%) rate, they had contracted to shift the effects of the tax primarily to non-Montana utility companies and thus to citizens of other states. These facts were known to the legislature when it adopted the tax. The best evidence of the relative political influence of these groups in the Montana legislature is the current thirty percent (30%) rate of the tax.

It is precisely such considerations which call for special scrutiny here, *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 288-89 n.15 (1977), and which distinguish cases such as *City of Pittsburgh* v. *Alco Parking Corp.*, 417 U.S. 369 (1974), based solely on Due Process or Equal Protection grounds from those which involve delicate Commerce Clause considerations, as well. *See Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 n.3 (1973). In the end, it is electricity ratepayers in other states who are both effectively excluded from the political process in Montana and who are being forced to pay substantially *more* than their own way. That is one vice of this tax. Further inquiry, both by this Court and at trial, is necessary to protect these Commerce Clause interests from further erosion. *See Austin* v. *New Hampshire*, 420 U.S. 656, 662 (1975).

VI.

THE MONTANA TAX CONTRAVENES THE SUPREMACY CLAUSE

We advert briefly to appellants' Supremacy Clause claims:

A. While both appellees and the Montana Supreme Court profess difficulty in discerning the effect of the federal statutes on which appellants rely, other states do not share that disability, as the *amici* briefs of Texas and Minnesota vividly show.

B. Appellees do not contest the fact that there is a federal policy designed to ensure the production and use of coal as a primary energy resource of the Nation, but adopt—as though it were dispositive—the erroneous holding of the court below that this policy favors the production of eastern and midwestern coal, as opposed to western coal. (Motion at 21-22). This is simply not so. The 1977 Amendments to the Clean Air Act, to which appellees refer, will ultimately have the effect of continuing the production of eastern and midwestern coal at approximately current levels. At the same time, however, the Amendments continue the predominant position of western low-sulphur coal in meeting our Nation's energy needs.[3] *See, e.g.*, H.R. Rep. No. 294, 95th Congress, 1st Sess., *reprinted in* [1977] U.S. Code Cong. & Admin. News 1077-1577 at 1245.

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3 Thus, the Department of Energy has predicted that western coal production will climb by 11% per annum through 1995, while eastern production may grow by only 3.2% per year. Department of Energy, *Energy Supply and Demand in the Midterm: 1985, 1990 and 1995* at 106 (April 1979). *See also* Environmental Protection Agency, *EPA Tables Relating to New Standards for New Coal-Fired Power Plants* at Table 4 (May 25, 1979).

This is but one illustration of the many errors which could have been avoided if the parties had been permitted to present evidence which illuminated national policies.

C. In their final argument, appellees brush off important federal rights which lie at the heart of the Mineral Lands Leasing Act of 1920 (the "Act"). Fully three-quarters of the coal in Montana belongs to the federal government; the vast bulk of that coal remains to be leased for extraction pursuant to the Act, as amended.

It is specifically alleged in this case (Complaint ¶ 42, Apdx. 59a) that the purpose, intent and effect of the Coal Severance Tax was to appropriate to Montana the "economic rents" attributable to the extraction of federally-owned coal in Montana, and thus to deprive the federal government—and through it, the people of the United States—of the economic benefits of this vast nationally-owned resource.

To rely—as both appellees and the Montana Supreme Court do—on a proviso in that Act (30 U.S.C. § 189) is to stand the Act on its head. *Mid-Northern Oil Co.* v. *Montana*, 268 U.S. 45 (1925), which construed that proviso, did not raise the question presented here. The tax in that case amounted to one percent (1%) of value and was presumably related to legitimate governmental costs. The proviso certainly extends to such taxes, but cannot be expanded without limit.

In this context, the present "tax" is not a "tax" at all; it is a "tribute" which substantially frustrates and impairs the central purpose of the Act by appropriating to Montana revenues which ought to go in the first instance to the federal government.

CONCLUSION

For each of the reasons set forth above and in appellants' Jurisdictional Statement, this Court should note probable jurisdiction to review the opinion and judgment of the court below.

Respectfully submitted,

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